



Federal Communications Commission
Washington, D.C. 20554

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DA 06-502
In Reply Refer to:
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Kovas Communications of Indiana, Inc.
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In re: **WMCW(AM), Harvard, Illinois**
Facility ID No. 43241
Application for Major Modification
File No. BMJP-20050114ADY

Dear Counsel:

This letter refers to the above-noted application filed by Kovas Communications of Indiana, Inc. ("KCI") for major modification to the facilities of station WMCW(AM), Harvard, Illinois, seeking to relocate the station's facilities and change its community of license to Weston, Wisconsin. For the reasons set forth below, we dismiss the application.

Background. KCI timely filed its FCC Form 175 application to change the WMCW(AM) community of license during the filing window for AM Auction No. 84 ("Auction 84").¹ The application was determined not to be mutually exclusive with any other proposal filed in the Auction 84 filing window, and KCI was invited to file its complete FCC Form 301 application by January 18, 2005.² KCI timely filed its complete FCC Form 301 application on January 14, 2005. KCI proposes a change in community of license, and a change to the WMCW(AM) technical facilities. KCI attached to its application an exhibit addressing the implications of the proposed community change under Section 307(b) of the Communications Act of 1934, as amended,³ which directs the Commission to make a "fair, efficient, and equitable" distribution of radio service among communities in the United States.⁴

WMCW(AM) is the sole local transmission service licensed at Harvard, Illinois (2000 Census population 7,996). KCI proposes to change WMCW(AM)'s community of license to Weston, Wisconsin (2000 Census population 12,079) as that community's first local radio transmission service. KCI's

¹ See *Public Notice*, "AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze," 18 FCC Rcd 23016 (MB/WTB 2003).

² See *Public Notice*, "AM Auction No. 84 Singleton Applications," 19 FCC Rcd 22569 (MB 2004).

³ 47 U.S.C. § 307(b) ("Section 307(b)").

⁴ *Id.* See *Public Notice*, "Section 307(b) Amendment Deadline Established for Certain AM Auction No. 84 Singleton Applications," 20 FCC Rcd 10701 (MB 2005).

engineering report indicates that 27 radio stations currently provide protected service to all or part of Harvard, and 27 stations currently provide protected service to all or part of Weston.⁵ Because Weston receives coverage from only nine AM stations (compared with 20 AM stations covering Harvard), KCI argues that Weston “is in particular need of coverage by AM stations.”⁶

Discussion. The Commission’s policies on allowing broadcast stations to change their communities of license are based on Section 307(b) and the goals of fair, efficient, and equitable distribution of radio service that underlie it. Our *FM Assignment Policies* delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.⁷ The fourth priority is “other public interest matters,” which encompasses any other factors that the Commission may take into consideration.⁸ Retention of the sole local service at Harvard, and the institution of first local service at Weston, both implicate Priority (3) – first local transmission service. However, notwithstanding that the existing and proposed arrangements of stations both trigger the same allotment priority, the Commission prohibits the removal of an existing station representing a community’s sole local transmission service.⁹ This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.¹⁰ But the Commission has emphasized that “the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver.”¹¹ Rather, such a proposal “is presumptively contrary to the public interest.”¹² In this regard, the Commission has stated that:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another, regardless of whether

⁵ KCI Engineering Report at 3. KCI states that all or part of Harvard receives service from 20 AM and seven FM stations, and all or part of Weston receives service from nine AM and 18 FM stations. Five FM and 17 AM stations provide protected service to all of Harvard, while seven AM and 14 FM stations provide protected service to all of Weston. *Id.* The Commission has determined that a community receiving service from at least five stations is abundantly served. See *Family Broadcasting Group*, 53 R.R.2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); see also *LaGrange and Rollingwood, Texas*, 10 FCC Rcd 3337 (MMB 1995).

⁶ KCI Exhibit with Respect to Section 307(b), second unnumbered page.

⁷ *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88, 91-93 (1982) (“*FM Assignment Policies*”). Priorities (2) and (3) are co-equal. The FM allotment priorities are applied to Section 307(b) determinations for community change proposals for AM stations. *Allesandro Broadcasting Co.*, 56 R.R.2d 1568 (Rev. Bd. 1984).

⁸ *FM Assignment Policies*, 90 F.C.C.2d at 93.

⁹ *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (“*New Community R & O*”), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094, 7097(1990) (“*New Community MO&O*”).

¹⁰ *Id.* On waiver standards generally, see *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

¹¹ *New Community MO&O*, 5 FCC Rcd at 7097.

¹² *Id.*

the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.¹³

KCI does not specifically seek waiver of this policy, nor does it set forth public interest factors such as those the Commission has suggested might warrant waiver.¹⁴ Instead, KCI states that “the instant application is part of a larger arrangement” wherein commonly owned Kovas Communications, Inc. (“Kovas”) filed an application in the Auction 84 filing window to move Kovas’s station WONX(AM) from Evanston, Illinois (where it is a fourth local transmission service) to become a first local service at Carol Stream, Illinois.¹⁵ The WONX(AM) application, however, is contingent upon grant of the WMCW(AM) Auction No. 84 modification application, as the relocated WONX(AM) facilities would conflict with WMCW(AM) at its current community of Harvard. Thus, argues KCI, “the proper analysis is not an analysis comparing Harvard, Illinois and Weston, Wisconsin . . . but an analysis comparing the public interest benefits of the reallocation of WONX(AM) to Carol Stream in conjunction with the relocation of WMCW(AM) to Weston.”¹⁶ KCI states that if the instant application is not granted, it will relinquish its authorization for WMCW(AM) in order to facilitate the WONX(AM) community change. Thus, concludes KCI, “the real choice is not between WMCW(AM) remaining in Harvard as opposed to moving to Weston, but whether WMCW(AM) should be allowed to relocate in lieu of ceasing operations.”¹⁷ So, while KCI does not specifically request waiver, it appears nonetheless to argue that the proposed WONX(AM) change of community, and the necessity of relocating WMCW(AM) to accommodate that change, constitutes special circumstances, and that deviation from the policy prohibiting sole transmission service relocation will serve the public interest, offsetting the expectation of continued transmission service at Harvard.

However, we disagree with KCI’s evaluation of the “proper analysis” to be undertaken in a case such as this. While Weston is approximately one and one-half times larger than Harvard, and would be preferred if this were a comparison between proposals for new service, this in and of itself does not justify a change of community of license that would deprive the community of Harvard of a 50-year-old radio service on which it has come to rely for programming serving its needs. The Commission has held that a licensee’s proposal to remove a station to a larger community does not by itself justify the removal of a smaller community’s sole local broadcast service.¹⁸ We also find no merit in KCI’s assertion that Weston is in particular need of AM reception service. The Commission has long held that AM and FM stations

¹³ *Id.*

¹⁴ The Commission stated that waiver was appropriate under the “rare circumstances” in which removal of local service might serve the public interest, for example, if the removal would result in providing first reception service to a significantly sized population. *New Community MO&O*, 4 FCC Rcd at 7096.

¹⁵ File No. BMJP-20040127AJF. Kovas settled with the other applicants whose applications were mutually exclusive with its WONX(AM) application, and subsequently filed a Form 301 application, file no. BMJP-20051031ACF, which is currently pending.

¹⁶ KCI Exhibit with Respect to Section 307(b), first unnumbered page.

¹⁷ *Id.*

¹⁸ *See, e.g., Potts Camp and Saltillo, Mississippi*, 16 FCC Rcd 16116 (2001) (denying relocation of sole local service at a town of 483 to a town of 1,782).

together comprise one aural broadcast service.¹⁹ Thus, we do not differentiate between AM and FM coverage in determining the level of service to a community. Even if we were to do so, both communities receive protected service from more than five AM and five FM stations; thus, both are abundantly served (and, additionally, receive roughly equivalent levels of aural reception service).²⁰

Moreover, we reject out of hand KCI's threat to relinquish the WMCW(AM) authorization, should we fail to grant the instant application, as a basis for waiver of the Commission's policy on removal of sole local service. First, its contention that WMCW(AM) must move from Harvard presupposes that the Kovas application to move WONX(AM) to Carol Stream is grantable, despite being contingent upon grant of the instant application.²¹ Second and more importantly, however, KCI misapprehends the nature of the Commission's policy disfavoring removal of sole local transmission service. As noted above, that policy embodies the Commission's determination that continuity of established radio service at and to communities is in the public interest. WMCW(AM) has provided a local transmission service at Harvard for 50 years. KCI's "move it or lose it" threat essentially amounts to a declaration that applicants, rather than the Commission, may unilaterally determine the public interest benefits of station assignments under Section 307(b): KCI and Kovas have decided that a new local transmission service at Carol Stream, Illinois, is preferred over continued local service at Harvard, Illinois, and are prepared to take whatever steps they deem necessary to achieve that end. We cannot force KCI to retain its WMCW(AM) authorization. However, if it should choose to carry out its threat of relinquishing the authorization, other applicants will have the opportunity to seek new or improved service made possible by the relinquished spectrum.

The record in this case thus fails to demonstrate sufficient public interest factors to offset the expectation of continued local service at Harvard, Illinois. Accordingly, we cannot find that the public interest, convenience, and necessity will be served by KCI's proposal. Therefore, the application of Kovas Communications of Indiana, Inc., File No. BMJP-20050114ADY, for major modification to change the community of license of station WMCW(AM), Harvard, Illinois, IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ See, e.g., *Interstate Broadcasting Co., Inc.*, 35 F.C.C.2d 737, 738 (1972).

²⁰ See *supra* note 5.

²¹ See 47 C.F.R. § 73.3517 ("Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing."). While there is an exception for mutually contingent AM applications that cross-reference each other and are filed pursuant to an interference reduction arrangement, no such arrangement is disclosed in either the instant application or the WONX(AM) modification application.